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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC MAIL SECTION

FCC 93M-401

3-185 11 50 AM '93

93-107

MM DOCKET NO. 93-107

In re Applications of

DAVID A. RINGER

File No. BPH-911230MA

ASF BROADCASTING CORPORATION

File No. BPH-911230MB

WILBURN INDUSTRIES, INC.

File No. BPH-911230MC

SHELLEE F. DAVIS

File No. BPH-911231MA

WESTERVILLE BROADCASTING COMPANY
LIMITED PARTNERSHIP

File No. BPH-911231MB

OHIO RADIO ASSOCIATES, INC.

File No. BPH-911231MC

For Construction Permit for
an FM Station on Channel 280A,
in Westerville, Ohio

DISPATCHED BY

MEMORANDUM OPINION AND ORDER

Issued: June 23, 1993 ; Released: June 25, 1993

1. Ohio Radio Associates, Inc. (ORA) wants a ruling on a "Motion to Enlarge Issues Against WBC." They filed their motion on May 25, 1993, and want both a financial issue and a financial misrepresentation issue added against WBC. Westerville Broadcasting Company, Limited Partnership (WBC) opposed ORA's motion on June 9, 1993 and supplemented that opposition on June 15, 1993. ORA replied on June 21, 1993. For the reasons that follow ORA's motion will be granted.

The Financial Issue Request

2. A financial qualifications issue will be added against WBC. ORA has pleaded with the requisite sufficiency and specificity to warrant adding such an issue. See 47 CFR 1.229(d).¹

3. At the time a broadcast applicant certifies that they are financially qualified, they must have prepared a two-part showing. First, they must detail their proposed cost of the construction; and secondly, they must show the cost of operating their proposal for the first three months without revenues. These two sub-showings are then combined to show the total financial obligation the applicant must meet, and they then must show that they have net liquid assets on hand or available from committed sources to meet that obligation.

¹ 47 CFR 1.229(d) governs, inter alia, motions to enlarge issues. It provides that "[s]uch motions. . . shall contain specific allegations of fact sufficient to support the action requested."

4. WBC has shown a cost of construction of \$293,000, and net liquid assets of \$300,000 to meet those construction costs. However, as ORA points out, WBC has submitted, and apparently prepared nothing on the second financial element; i.e., on the cost of operating for the first three months without revenues. Thus we know nothing about such costs as salaries for the staff; i.e., the station manager, announcers, the office staff, and the contract engineer. We have no estimate for three months utility costs; i.e., telephone, electric, water and sewage, etc. And we have no idea what the cost will be for such expenses as royalties, insurance, fees and taxes, accounting, office supplies, printing, photocopying and other costs of programming for three months.

5. WBC asserts that its \$293,000 estimated cost of construction contains \$49,700 in "overages" that will be available for "unanticipated" operational expenses. In support of this assertion Freeman Edwards II, WBC's general partner and the person who prepared the cost of construction estimate admits that he "intentionally" overstated real estate costs \$20,000; office equipment by \$4,500; transmitter plant by \$5,400; the transmitter building cost by \$11,000; and the studio equipment costs by \$8,000.² This after-the-fact rationalization cannot serve as a proxy for WBC's failure to do the job right in the first place.³

6. Next, WBC argues that their construction costs of \$293,000 exceeds the total costs of each of its five opponents (including ORA) and thus "that ORA is engaged in pointless flyspecking." That argument is sheer sophistry. Financial qualifications are not a comparative matter. When an applicant certifies that they are financially qualified, the financial estimates on which they rely are assumed to be a good faith effort to portray what their ultimate proposal will look like. A financial qualification issue will be added against WBC.

ORA's Financial Misrepresentation Request

7. If the only pleading before the Trial Judge was ORA's May 25, 1993 Motion to Enlarge, he would deny their misrepresentation request. The moving motion clearly fails to plead with the required sufficiency and specificity to warrant adding a character issue against WBC.

² It really isn't clear why Edwards would intentionally create such a false cost of construction summary. He says it was to take care of "unanticipated operational expenses." But that doesn't make sense. Item 10 in his construction summary is "miscellaneous, spares and contingency" of "\$39,000." That appears to be the item set up for unanticipated construction expenses. But the costs described in paragraph 4 above are not mentioned in any of WBC's documents.

³ Freeman Edwards, an AT&T network planning engineer avers that he has "...also prepared cost estimates for other applications filed with the FCC. ..." However, it is noted that in the common carrier held the applicant (AT&T) is not required to show what it will cost to operate the proposal applied for, for three months without revenues.

8. But ORA's May 25th motion doesn't stand alone. We have WBC's June 9th opposition as supplemented on June 15th, and we have ORA's June 21st reply. When all the pleadings and declarations are analyzed in combination, a serious misrepresentation question is presented. Freeman Edwards, in his Declaration of June 8, 1993, attempts to create the impression that even though he never prepared a specific showing of the first three months operating expenses, he did consider such operating expenses when he prepared his cost of construction summary. That is hard to believe. We had better find out if it's true or not. Moreover, Edwards, by his own admission, has intentionally created a fake cost of construction summary. A financial misrepresentation issue will be added.

SO the "Motion to Enlarge Issues Against WBC" that Ohio Radio Associates, Inc. filed on May 25, 1993, IS GRANTED; and the following issues are added to the proceeding:

- "WBC-1: To determine whether Westerville Broadcasting Company has sufficient committed funds available to construct and operate its proposal for the first three months without the benefit of revenues, and if not, whether they are financially qualified to be a Commission licensee;⁴
- "WBC-2: To determine whether Westerville Broadcasting Company has misrepresented its financial qualifications, and if so, whether they possess the requisite character qualifications to be a Commission licensee.

Both the burden of proceeding and the burden of proof on WBC-1 is on Westerville Broadcasting Company. On WBC-2 the burden of proceeding is on ORA, with the ultimate burden of proof being on Westerville Broadcasting Company.

Within 10 days of the release of this Order, WBC WILL MAKE the following documents available (if such documents exist) at the law offices of McNair and Sanford, 1155 15th Street, N.W., Suite 400, Washington, D.C. 20005:

- (a) All notes or drafts relating to their cost estimates which have not already been produced;
- (b) All records of telephone conversations and facsimile transmissions relating to the preparation of its cost estimates which have not already been produced; and
- (c) All documents relating to the sources of information for the costs included in its estimates which have not already been produced.

⁴ WBC must make the standard backward-forward showing; i.e., they must show that they were financially qualified back on December 31, 1991 when they filed their application and certified they were. Then they must show that they are financially qualified now. See Aspen FM, Inc. FCC 90R-37, released May 23, 1990 at paras. 15-17 Shawn Phalen, FCC 90R-64.

All discovery on WBC-1 and WBC-2 will be completed within 60 days of the release of this Order.⁵

Notice of Forfeiture

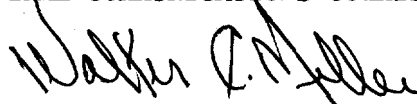
9. Westerville Broadcasting Company IS NOW NOTIFIED, pursuant to 47 CFR 1.80(f)(1) that if it develops that WBC has misrepresented or lacked candor regarding the estimates underlying their BPH-911231MB financial certification they will be assessed a \$25,000 forfeiture for each such violation.⁶

10. Specifically, substantial and material questions of fact exist whether WBC and/or its general partner Freeman Edwards has considered the cost factors that go into the cost of operating the WBC proposal for three months without revenue.

WBC-1 and 2 will be tried in Phase II of this Hearing. The following Phase II procedural dates WILL GOVERN:

September 20, 1993-	The Phase II written exhibits will be exchanged.
September 27, 1993-	Phase II witness notification will take place (both in writing and by telephone).
October 4-6, 1993 -	The Phase II hearing will take place.

FEDERAL COMMUNICATIONS COMMISSION



Walter C. Miller
Administrative Law Judge

⁵ Without in any way limiting ORA's discovery efforts, they may wish to interview and/or depose Ms. Linda Baker of Harris-Allied Broadcast Products. See Declaration of Freeman Edwards II, dated June 8, 1993 at paras.3, and 5E.

⁶ For example, if it develops that Freeman Edwards has made 5 separate misrepresentations in his December 20, 1991 Construction Summary, WBC would be subject to \$125,000 in forfeiture.